Supreme Court, U.S.
FILED
98 476 SEP 21 1998
OFFICE OF THE CLERK
No.
COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

ALFRED P. DYER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Whether a federal court on habeas corpus may reject the presumption of correctness in former 28 U.S.C. § 2254(d) for state court findings of fact by imposing on the state trial court an independent duty to investigate and develop evidence pertaining to allegations of juror bias.

2. Whether a rule presuming bias and requiring reversal of a state criminal conviction based on a juror's failure to provide information during voir dire violates *Teague v. Lane*, 489 U.S. 288 (1989).

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT STATUTORY PROVISION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
A. Imposing Upon State Trial Judges An Independent Duty To Investigate Claims of Alleged Juror Bias Exceeds The Authority of Federal Habeas Courts and Undermines The Presumption of Correctness For State Court Fact Finding	10
B. A Rule Of Implied Bias Based On The Failure To Provide Information During Jury Voir Dire Violates *Teague*	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page
Buckner v. Street 4 F.Cas. 578 (E.D. Ark. 1871)	19
Calderon v. Ashmus 118 S.Ct. 1695 (1998)	9
Calderon v. Thompson 118 S.Ct. 1489 (1998)	8
Caspari v. Bohlen 510 U.S. 383 (1994)	15
Dyer v. California 488 U.S. 934 (1988)	15
Engle v. Isaac 456 U.S. 107 (1982)	8
Fitzgerald v. Greene ___ F.3d ___ 1998 WL 388405 (4th Cir. 1998)	17
Gideon v. Wainwright 372 U.S. 335 (1963)	19
Gilmore v. Taylor 508 U.S. 333 (1993)	15
Graham v. Collins 506 U.S. 461 (1993)	19

TABLE OF AUTHORITIES, CONT'D

Hurtado v. California
110 U.S. 516 (1884) 19

Keeney v. Tamayo-Reyes
504 U.S. 1 (1992) 6, 9, 11, 14

Lambrix v. Singletary
117 S.Ct. 1517 (1997) 15, 16, 18

Lindh v. Murphy
96 F.3d 856 (7th Cir. 1996) (en banc),
reversed on other grounds
Lindh, 117 S.Ct. 2059 9

Marshall v. Lonberger
459 U.S. 422 (1983) 10

McDonough Power Equipment, Inc. v. Greenwood
464 U.S. 548 (1984) 14

Neeley v. Nagle
138 F.3d 917 (11th Cir. 1998) 9

O'Brien v. Dubois
145 F.3d 16 (1st Cir. 1998) 9

O'Dell v. Netherland
117 S.Ct. 1969 (1997) 15, 17-19

Patton v. Yount
467 U.S. 1025 (1984) 14

TABLE OF AUTHORITIES, CONT'D

People v. Dyer
45 Cal.3d 26
246 Cal.Rptr. 209 (1988) 5, 11

Rushen v. Spain
464 U.S. 114 (1983) 12

Saffle v. Parks
494 U.S. 484 (1990) 19

Sawyer v. Smith
497 U.S. 227 (1990) 18, 19

Seminole Tribe v. Florida
116 S.Ct. 1114 (1996) 19

Smith v. Phillips
455 U.S. 209 (1982) 12, 13, 16

Sumner v. Mata
449 U.S. 539 (1981) 10

Sumner v. Mata
455 U.S. 591 (1982) 10

Teague v. Lane
489 U.S. 288 (1989) 7, 9, 13, 20

Tinsley v. Borg
895 F.3d 520 (9th Cir. 1990) 17

Tumey v. Ohio
273 U.S. 510 (1927) 18

TABLE OF AUTHORITIES, CONT'D

United States v. Malloy
758 F.2d 979 (4th Cir. 1985) 17

Wainwright v. Witt
469 U.S. 412 (1984) 12, 14

Wood v. Bartholomew
116 S.Ct. 7 (1995) 12

Constitutional Provisions

Antiterrorism and Effective
Death Penalty Act of 1996 (AEDPA) 9

Statutes

28 United States Code
§ 1254(1) 2
§ 2254(d) 2, 9

Other Authorities

Dr. Bonham's Case
77 Eng. Rep. 646, 652 (C.P. 1610)
7, 18

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No.

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

ALFRED P. DYER, *Respondent*.

Arthur Calderon, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The en banc opinion of the Court of Appeals, App. A at 1-57, is reported at ___ F.3d ___, 1998 WL 448039 (9th Cir. 1998). The amended panel decision of the Court of Appeals, App. B at 58-146, is reported at 122 F.3d 720. The orders of the District Court granting partial summary judgment for the State, App. C at 146-259, and denying habeas corpus relief following an evidentiary hearing, App. D at 261-320, are unreported.

STATEMENT OF JURISDICTION

The en banc judgment of the Court of Appeals was entered on August 6, 1998. App. A. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Former 28 U.S.C. § 2254(d) provides in pertinent part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> . . .
>
> (3) that the material facts were not adequately developed at the State court hearing . . . ."

STATEMENT OF THE CASE

On the evening of November 8, 1980, respondent Alfred Dyer [hereafter Dyer], his half-brother Michael Jackson, and Cleveland Ario went to Belinda Murray's apartment in Oakland, California. There, they used drugs and alcohol with Belinda, Nora Fluker, and Bennie Warren. After becoming convinced that property had been stolen from him, Dyer pistol-whipped Warren, then ordered Warren, Fluker, and Murray, as well as the latter's brother, Floyd Murray, to enter Ario's car; Jackson assisted him. Dyer and Jackson were both armed with pistols. They left behind six children, ranging in age from 5 months to 6 years.

After driving to an isolated area of the Oakland hills, the four victims were taken from the car, forced onto the ground, and shot by Dyer and Jackson. Nora Fluker and Floyd Murray died; Belinda Murray, who was shot and severely beaten, and Bennie Warren, who was shot in the head, survived. Dyer never denied his involvement in the crimes, but claimed only that he was mentally impaired by the drugs and alcohol he had consumed.

An Alameda County Superior Court jury convicted Dyer in 1983 on two counts of first degree murder with special circumstances, two counts of attempted murder, and kidnapping. The same jury sentenced Dyer to death for the murders.

During voir dire at Dyer's trial, prospective jurors were asked to respond to several questions. Among them were the following:

> "13. Have you or any of your relatives or close friends ever been the victim of any type of crime?"

> "15. Have you or any of your relatives or close friends ever been accused of any offense other than traffic cases?"

After swearing a jury, the trial court seated three alternate jurors. Among them was Jessica ("Jez") Freeland. Ms. Freeland answered "no" to questions 13 and 15. She was selected as an alternate and eventually replaced one of the original jurors prior to guilt deliberations.

During the penalty phase, Dyer's counsel advised the trial court that Ms. Freeland's brother had been killed over a drug incident and that Ms. Freeland had expressed strong views about the events and the circumstances surrounding it. He received this information from Dyer, who claimed to have learned about it from Ms. Freeland's husband, Melvin Provost. ER 271-272.[1] Co-counsel later spoke directly with Provost, who was estranged from Ms. Freeland, and reported to the trial court that while the juror's brother had been killed, Provost was not sure whether an alleged perpetrator was tried or indeed whether death had even resulted from a criminal agency. ER 276. Upon hearing the name Richard Freeland, the prosecutor recalled he had handled a homicide with a victim by that name, noting that it had been resolved by a plea bargain to manslaughter. The prosecutor gave the District Attorney's file on that case to the trial court. ER 277-278.

Ms. Freeland was then called into chambers and asked about her brother, Richard. She explained that she understood her brother's death had resulted from an accident and was not sure whether any criminal charges

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1. The entire state record from Dyer's trial was lodged with the District Court and available for review by the Circuit Court. ER designates specific portions of the record presented on appeal pursuant to Circuit Rule 17-1.

had resulted. She did not mention the event during voir dire because she did not think Richard's death was a crime. Ms. Freeland insisted that she could be fair to Dyer. She was not asked about the charges against Provost or any recent contact she may have had with him. ER 279-281.

The trial court reviewed the voir dire transcript and found no lack of candor in Ms. Freeland's answers. There was no showing of how close Ms. Freeland was to her brother and no showing other than her answers with respect to what information Ms. Freeland had about her brother's death. The court denied a motion for mistrial. ER 283-284. In response to a subsequent motion for new trial based on Ms. Freeland's failure to mention the death of her brother, as well as her husband's criminal history, the trial court found that the voir dire questions were ambiguous and the responses by Ms. Freeland had been inadvertent. ER 338-341, 352-358.

On direct appeal the California Supreme Court rejected Dyer's claim of juror misconduct based on Ms. Freeland's failure to disclose the killing of her brother. The court agreed that the voir dire questions were ambiguous and found no evidence that Ms. Freeland was lying when she answered the crime victim question. *People v. Dyer*, 45 Cal.3d 26, 58-59, 246 Cal.Rptr. 209, 227-228 (1988). The court also rejected Dyer's motion to take judicial notice of various documents, including a wrongful death action filed against the man who shot Richard Freeland. The documents predated the trial and no showing was made to justify Dyer's failure to present them to the trial court. *Id.* at 59, 246 Cal.Rptr. at 227-228. The state supreme court subsequently denied habeas corpus claims relating to Ms. Freeland.

Dyer raised the juror issue in his federal habeas corpus challenge to the state death judgment. The District Court held that the state court's finding of no bias and its credibility determinations were subject to the

presumption of correctness in former 28 U.S.C. § 2254(d) and found, in reliance on *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), that Dyer was not entitled to a mandatory federal evidentiary hearing on this claim because he had failed to develop the issue in state court. App. C at 158-166. The District Court, "out of an abundance of due process," nonetheless granted a discretionary hearing on the Freeland allegations. App. C at 170.

Dyer's counsel deposed Ms. Freeland. Her testimony revealed that she was once attacked with a knife by a young cousin; that her father had been arrested for kidnapping his children; that her brother and uncle had been accused of crimes; that her family home had been burglarized on multiple occasions; and that Provost, her former husband, had been arrested for rape. Ms. Freeland had not mentioned any of these events in her voir dire responses. There was also evidence demonstrating that Ms. Freeland lived at home and was close to her brother at the time he was killed; that his death caused the family pain; that her mother had testified in the preliminary hearing of the man charged with killing Richard Freeland; and that her family had filed a wrongful death action which resulted in a $15,000 settlement. App. B at 68.

Because Dyer was unable to serve her with a subpoena for the evidentiary hearing, the District Court relied upon the transcript from Ms. Freeland's deposition. The court concluded that Ms. Freeland "did not deliberately conceal material information on voir dire," and found "no basis for an inference that Freeland was biased." The court refused to presume bias. Because there was nothing which "detract[ed] from the state court's findings about her credibility," the district court determined that the state factual findings of no intentional deception and impartiality were entitled to the statutory presumption of correctness. App. D at 312-313.

On appeal the Ninth Circuit panel, by a 2-1 vote, affirmed the judgment of the District Court. It held that the state court findings of *impartiality* were entitled to the presumption of correctness, noting that the failure to develop additional facts in state court was properly attributable to Dyer. Because none of the federal district court's determinations with respect to Ms. Freeland's credibility were clearly erroneous, the additional facts about her background developed in federal court did not undermine the presumption of correctness. App. B at 72-74.

The Ninth Circuit reheard the case en banc and, in a 7-4 decision, reversed the District Court. Because the state trial judge failed to satisfy "an independent responsibility" to investigate claims of juror bias, the presumption of correctness was deemed inapplicable. Based on its own evaluation of Ms. Freeland's credibility, the Circuit Court found that she "lied, and lied repeatedly," and did so initially in order to sit on Dyer's jury and later "to preserve her status as a juror and to secure the right to pass on Dyer's sentence." The court found it unnecessary to resolve whether the juror was acutally biased against Dyer, but instead held it could "presume bias where a juror lies in order to secure a seat on the jury." The presence of such an implicitly biased juror, the court concluded, denied Dyer a fair trial. App. A at 24-30.

The majority rejected the State's argument that reliance on implied bias would violate the prohibition in *Teague v. Lane*, 489 U.S. 288 (1989) against creating new rules on habeas corpus. Based on dictum in *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610), the circuit court determined that the rule of implied bias is "so deeply embedded in the fabric of due process that everyone takes it for granted." That this Court had never adopted such a rule, according to the Ninth Circuit, did not make it "new." App. A at 30-34.

In a dissenting opinion, four judges of the en banc panel rejected the majority's failure to honor the presumption of correctness, explaining that such failure had resulted from improper appellate fact finding and credibility determinations. The dissent also concluded that the "perjury inquiry" conducted by the majority to support its finding of implied bias had created a new rule in violation of this Court's teaching in *Teague*. App. A 34-41.

A second dissent, signed by the same four judges, found that the rule of implied bias announced by the majority violated *Teague*. At the time Dyer's judgment became final no state court would have felt compelled to adopt such a rule by any decision of this Court, nor were state courts obligated to follow any lower federal court decisions involving implied bias. The dissent could find no exception to *Teague* based on "the dictum of a seventeenth-century English common-law judge." App. A at 41-57.

REASONS FOR GRANTING THE WRIT

Although the writ of habeas corpus "indisputably holds an honored position in our jurisprudence," this Court has "always recognized" that it "entails significant costs." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). Given its concerns for comity, federalism, and finality, the Court has "found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." *Calderon v. Thompson*, 118 S.Ct. 1489, 1500 (1998). The Ninth Circuit en banc decision ignored the restraints placed upon its habeas corpus authority by this Court, as well as by Congress.

The Ninth Circuit held that the state trial court was required *sua sponte* to conduct a more extensive hearing on the allegations of juror misconduct, although Dyer had never made such a claim in any court. In doing so it

improperly asserted supervisory authority over state courts, disregarded *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and effectively nullified the statutory presumption of correctness in former 28 U.S.C. § 2254(d).[2/]

By holding that bias should be implied when a juror withholds information during voir dire the en banc panel violated the nonretroactivity principle, first pronounced in *Teague v. Lane*, 489 U.S. 288 (1989). No case from this Court involving juror bias compels the rule announced by the Ninth Circuit.[3/]

The en banc opinion conflicts with decisions of this Court and and raises significant questions about the limits on federal habeas review of state criminal convictions. The Ninth Circuit holdings warrant review by this Court.

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2. Since enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the presumption of correctness for state court factual findings is contained in subdivision (e)(1) of § 2254.

3. Pursuant to the AEDPA, subdivision (d)(1) of 28 U.S.C. now prescribes a "new, highly deferential standard for evaluating state court rulings," *Lindh v. Murphy*, 117 S.Ct. 2059, 2066 n. 7 (1997). The state did not seek application of new subdivision (d) in the lower courts because it was enjoined from asserting qualification under Chapter 154 of 28 U.S.C., enacted by the AEDPA, *see* § 2264(b) (incorporating review standard of § 2254(d); *see generally Calderon v. Ashmus*, 118 S.Ct. 1695 (1998), and because subdivision (d) was not otherwise applicable inasmuch as the application for relief was filed in the District Court before the effective date of the AEDPA, *see Lindh*. However, Congress "plainly embrace[d] one of *Teague*'s primary goals," *O'Brien v. Dubois*, 145 F.3d 16, 23 (1st Cir. 1998), by focusing on the reasonable, good faith interpretation of existing precedent by state courts. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *reversed on other grounds*, *Lindh*, 117 S.Ct. 2059; *see also Neeley v. Nagle*, 138 F.3d 917, 923 (11th Cir. 1998). Thus cases applying *Teague* are of continued importance to the interpretation and applicaton of the AEDPA. Unless otherwise stated, all further references in this petition are to the pre-AEDPA version of § 2254(d), *i.e.*, the presumption of correctness.

A. Imposing Upon State Trial Judges An Independent Duty To Investigate Claims of Alleged Juror Bias Exceeds The Authority of Federal Habeas Courts and Undermines The Presumption of Correctness For State Court Fact Finding

Section § 2254(d) "requires deference by federal courts to factual determinations of all state courts." *Sumner v. Mata*, 449 U.S. 539, 547 (1981) (*Mata I*). These provisions "were intended by Congress as limitations on the exercise of [federal court habeas] jurisdiction." *Id.* at 548 n. 2. The deference mandated by the statute requires more than a disagreement with the state determination before a federal court may reject the factual findings. "Instead, it must conclude that the state court's findings lacked even 'fair[] support' in the record." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Section 2254(d) "gives federal courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Id.* at 434. The requirements of § 2254(d) "could not be plainer," *Sumner v. Mata*, 455 U.S. 591, 592 (1982) (per curiam))*Mata II*), but nevertheless appear to have eluded the Ninth Circuit in this case.

The state trial court, which had already observed Ms. Freeland twice during jury selection, found no lack of candor in her response to questions about the death of her brother. The California Supreme Court properly refused to consider additional information relating to the juror's background proffered on appeal because that material, all of which had been available at the time of trial, was never presented to the trial court. *People v. Dyer*, 45 Cal.3d 26, 59, 246 Cal.Rptr. 209, 228 (1988).

Because he failed to develop the facts in the state trial court when given an opportunity to do so, the District

Court found, in reliance on *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), that Dyer was not entitled to a mandatory federal evidentiary hearing. It nonetheless granted a discretionary hearing in order to determine whether the presumption of correctness should apply to the findings about Ms. Freeland. App. C at 170. After reviewing her deposition testimony, the District Court concluded that "Freeland did not deliberately conceal material information on voir dire." App. D at 312. As such Dyer was unable to demonstrate any basis for rejecting the presumption of correctness applicable to the trial court's findings with respect to Ms. Freeland.

The Ninth Circuit nevertheless determined that the state court fact findings were not entitled to the presumption of correctness. The en banc Circuit Court excused defense counsel's failure to develop the facts because the trial judge "has an independent responsibility to satisfy himself that the allegation of bias is unfounded." App. A at 16-17. Attributing the failure to comply with this newly-created duty to an allegedly "ostrich-like desire to avoid learning anything that would jeopardize the verdict," App. A at 18, the federal court proceeded to make its own factual findings, many of which are wholly inconsistent with the record developed in both the state and federal courts.[4]

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4. For example, the Ninth Circuit concluded that Ms. Freeland "finagled[d] a seat on the jury," overlooking the fact that she was questioned and initially selected not as a regular juror but as an alternate. The circuit court criticized the state trial judge's failure to call Melvin Provost as a witness, ignoring the report from defense counsel which demonstrated that Provost in fact could provide little support for the assertion that Ms. Freeland lied about how much she knew of Richard's death and that the information reported through Dyer was exaggerated at best. The en banc decision took the trial court to task for not considering that Ms. Freeland was a plaintiff in a wrongful death case resulting from the killing of her brother, although her father testified in the federal evidentiary hearing that he

In *Smith v. Phillips*, 455 U.S. 209, 215 (1982), this Court held that the appropriate remedy when issues of juror bias arise after voir dire is a hearing which allows the defendant to prove actual bias. "Post-trial hearings are adequately tailored to this task," *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam), and the factual findings of the state court at such a hearing are entitled to the statutory presumption of correctness. *Smith*, at 218; *Spain* at 120. Although this Court has not perceived strict parameters of such a hearing, it has certainly never suggested that state trial courts are obligated to independently ferret out information not presented to them by counsel. We think it manifest that a "trial judge's job is difficult enough without senseless make-work." *Wainwright v. Witt*, 469 U.S. 412, 430 (1984).

The requirement that state trial courts conduct independent inquiries into claims of juror bias was imposed by the Ninth Circuit without reference to any constitutional imperative or any authority from this Court. Indeed, the panel majority in this case correctly recognized that the "onus" is not on the trial court "to unearth every bit of evidence that might indicate that a particular juror is biased." Rather, it is the adversary challenging the juror who must demonstrate bias. App. B at 73-74, quoting *Witt*, 469 U.S. at 423. Moreover, Dyer never asserted in any state or federal court, including the en banc argument, that the trial court should have

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doubted ever discussing that lawsuit with Ms. Freeland. Finally, the Circuit Court found it hard to believe that Ms. Freeland was unaware of the details surrounding Richard's killing based solely on its understanding from an *Atlantic Monthly* article on how families manifest grief. The speculation underlying the en banc's holdings about Ms. Freeland and her credibility is not faithful to the standards applicable on federal habeas corpus review. *Wood v. Bartholomew*, 116 S.Ct. 7, 10 (1995). Simply put, the en banc majority chose to reject all of Ms. Freeland's testimony based solely on its own unwarranted and unfounded assessment of her credibility.

conducted a more extensive hearing. Rather, he complained that trial counsel failed to adequately investigate Freeland once the issue was brought to his attention.[5]

Federal courts have "no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. at 221. Creating such a requirement and relying upon it to reverse a state criminal conviction is wholly inconsistent with the limited authority of federal habeas courts to review claims of unlawful custody by state prisoners.[6] The Ninth Circuit's holding all but eviscerates the presumption of correctness by allowing federal courts to override the presumption while second-guessing the adequacy of the state court's hearing by imposing on the court rather than the defendant the responsibility of developing available evidence. Such an approach is wholly inconsistent with *Keeney v. Tamayo-Reyes*, 504 U.S. at 10, which recognizes that a state court must afford a defendant a full and fair hearing on his federal claims but also mandates that the defendant

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5. Before moving for a new trial Dyer's counsel had an investigator undertake a background check on Ms. Freeland, a process that included conducting a telephone interview of her. Counsel also obtained from Provost a signed declaration in which he stated that he had no contact with Ms. Freeland during the trial and that to his knowledge Ms. Freeland attended no court proceedings relating to her brother's death. Neither the declaration nor any other information was offered to the trial judge in support of the new trial motion. These facts were developed during the District Court evidentiary hearing; the Provost declaration was specifically discussed by the District Court in its order denying relief. App. D at n. 12.

6. The dissenting judges in the en banc proceeding noted, App. A at 40, and we agree, that imposition of additional duties on the state trial court violated the prohibition in *Teague v. Lane*, 489 U.S. 288 (1989) against creation of new rules on habeas corpus.

"afford the State a full and fair opportunity to address and resolve the claim on the merits."

Moreover, the determination of juror bias is "essentially one of credibility, and therefore largely one of demeanor." *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). It is, therefore, a task "peculiarly within a trial judge's province." *Wainwright v. Witt*, 469 U.S. at 428. The state trial court was the *only* one throughout these proceedings to actually view Ms. Freeland. As the District Court, the majority of the Ninth Circuit panel, and the dissenters from the en banc panel recognized, that court was thus in the best position to assess her credibility. Disapproval of or even incredulity about the answers given by the juror are no substitute for the trial court's observations. They certainly cannot support the Ninth Circuit's own independent fact finding or its imposition of new duties on state trial courts.

The state court's findings that Ms. Freeland testified candidly at the midtrial hearing, that her incomplete responses were inadvertent, and that she answered in good faith given the ambiguities of the inquiries at trial are supported by the state court record and are presumptively correct. As this Court explained in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), a juror's mere failure to disclose information does not merit overturning a duly entered judgment. The Ninth Circuit erred in concluding otherwise.

B. A Rule Of Implied Bias Based On The Failure To Provide Information During Jury Voir Dire Violates *Teague*

Whenever a state prisoner requests federal habeas corpus relief from his conviction or sentence, he must demonstrate at the threshold that he does not seek the benefit of a new rule. *O'Dell v. Netherland*, 117 S.Ct. 1969, 1973 (1997). When raised by the state "the court *must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (emphasis in original). A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993). Because the *Teague* doctrine validates reasonable, good faith interpretations of precedent by state courts, a final state judgment may not be disturbed on federal habeas corpus "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell*, 117 S.Ct. at 1973.

There are three steps in the *Teague* analysis. First, the court must determine when the state conviction became final. Second, the court must survey the legal landscape as it then existed to determine whether a state court considering the claim would have felt compelled by existing precedent to conclude that the rule sought by the state prisoner was required by the Constitution. Third, if the court determines that a petitioner seeks the benefit of a new rule, it must consider whether the rule falls within one of two "narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 117 S.Ct. 1517, 1525 (1997).

Dyer's case became final for *Teague* purposes on October 31, 1988, when certiorari was denied from his direct appeal. *Dyer v. California*, 488 U.S. 934 (1988).

Unless the legal landscape as it then existed compelled the state court to apply a rule of implied juror bias, the Ninth Circuit erred in granting relief.[7] Review of decisions from this Court, *see Lambrix*, 117 S.Ct. at 1530, demonstrates that no controlling precedent dictated an implied bias rule.

As observed by Judge O'Scannlain in his dissent from the en banc decision, App. A at 44, the survey begins with *Smith v. Phillips*, *supra*. There the state trial court determined in a posttrial hearing that a juror was not biased against the defendant despite having submitted an application for employment to the District Attorney during trial. On federal habeas corpus the district court had found no actual bias but nevertheless imputed bias based on the circumstances and the circuit court affirmed. This Court reversed, concluding, as discussed above, that the "remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215. Because such a hearing suffices in federal court, "the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system." *Id.* at 218.

Justice O'Connor concurred, believing that the majority had not precluded consideration of implied bias in appropriate circumstances. *Id.* at 221-224 (O'Connor, J., concurring). Three other justices, however, expressed a different understanding in dissent, believing that the majority had found "the Constitution requires only that the defendant be given an opportunity to prove actual bias." *Id.* at 228 (Marshall, J., joined by Brennan, J. and Stevens,

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7. It is again important to note that the Ninth Circuit positioned itself to discuss implied bias only by creating new duties for state trial courts and then citing the state court's failure to comply with these previously unknown duties as a basis for both overcoming the presumption of correctness and undertaking its own contrary determinations of Ms. Freeland's credibility.

J., dissenting). What is important for present purposes is not resolution of these competing views, but rather the fact of their existence: "The array of views . . . suggests that the rule announced there was . . . 'susceptible to debate among reasonable minds.'" *O'Dell*, 117 S.Ct. at 1975. *See Fitzgerald v. Greene*, ___ F.3d ___, 1998 WL 388405 at *5 (4th Cir. 1998) (questioning viability of implied bias in light of *Smith*); *Tinsley v. Borg*, 895 F.3d 520, 527 (9th Cir. 1990) ("The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias."); *United States v. Malloy*, 758 F.2d 979, 982 (4th Cir. 1985) (concluding that verdict may be set aside only if juror were actually biased). Because a state court would not have felt compelled by *Smith* to imply bias in Dyer's case, the Ninth Circuit's imposition of such a rule violated *Teague*.

The Ninth Circuit's en banc majority cited *McDonough Power, supra* to support its assertion that bias could be presumed in extraordinary circumstances. App. A at 24-25. There the Court held that where a juror failed to provide information on voir dire, a new trial was required only if the aggrieved party demonstrated that the juror "failed to answer honestly a material question" and that a correct response "would have provided a valid basis for a challenge for cause." 464 U.S. at 556. Three justices concurred in the Court's opinion, but added that in exceptional circumstances bias could be inferred despite the honesty of the juror's answers. *Id.* at 556-557 (Blackmun, J., joined by Stevens, J. and O'Connor, J., concurring). Two other justices concurred only in the judgment, asserting that in some circumstances bias should be inferred. *Id.* at 557-559 (Brennan, J., joined by Marshall, J., concurring in judgment).

The Circuit Court's reliance on *McDonough* for a rule of implied bias is misplaced. First, the narrowest ground of decision among the Justices whose votes were necessary to the judgment related solely to the honesty of the juror's

response, an issue relating to actual bias. Only that rule could be considered compelling for *Teague* purposes. *O'Dell*, 117 S.Ct. at 1975. Moreover, the statements in the concurring opinions are plainly not holdings and as such cannot control or dictate a result, much less compel a state court to follow them. *Lambrix*, 117 S.Ct. at 1525.

The Ninth Circuit attempts to surmount the *Teague* threshold by concluding that the "rule" of implied bias it announced is "so deeply embedded in the fabric of due process that everyone takes it for granted." App. A at 31. As a survey of the relevant landscape makes clear, however, that characteization is historically inaccurate. Moreover, the limits of *Teague* "would be meaningless if applied at this level of generality." *Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (rejecting argument that rule sought by the state prisoner was implicitly rooted in the Eighth Amendment). Where this Court has not expressly articulated a rule, state courts cannot be faulted for failing to discern it themselves. That this Court had never explicitly *rejected* an implied bias rule scarcely demonstrates that the Court had announced that rule as a constitutional imperative binding on state courts. Any other conclusion means that this Court's silence with respect to a proposed rule substitutes as an affirmative precedent for its adoption—a view undermining *Teague* and the future application of the current version of 28 U.S.C. § 2254(d) enacted by the AEDPA.

The en banc majority's reliance on "dictum" in *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610) to establish the "pedigree" of its implied bias doctrine is clearly misplaced. App. A at 30-31. On the one occasion when this Court cited the relevant passage of *Bonham's Case*, it was for the principle that a judicial officer should not have an interest in the subject-matter of the case being heard. *Tumey v. Ohio*, 273 U.S. 510, 524 (1927). Prohibiting jurists from presiding over proceedings in which they have a personal stake does not compel

application of an implied bias rule to a juror's failure to provide information on voir dire.

More significantly, the Ninth Circuit embraces the additional assertion in the cited portion of *Bonham's Case* that some concepts of common law or natural law are so obvious as to be embedded in the fabric of the Constitution. That belief, however, found no support in England, *see Hurtado v. California*, 110 U.S. 516, 531 (1884) ("notwithstanding what was attributed to Lord Coke in *Bonham's Case* . . . the omnipotence of Parliament over the common law was absolute, even against common right and reason" [citation omitted]), and has been rejected in this country, *see Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1175 n. 56 (1996) (Souter, J., dissenting). *See also Buckner v. Street*, 4 F.Cas. 578, 581 (E.D. Ark. 1871) (noting criticism of common law dictum in *Bonham's Case* as "'nonsense still quoted by silly people.'")

Finally, the rule formulated by the Ninth Circuit does not fall within either of the exceptions to *Teague*. The first is inapplicable because the Ninth Circuit's rule neither decriminalizes any behavior nor prohibits imposition of the death penalty on Dyer. *Sawyer v. Smith*, 497 U.S. at 241. The second exception permits retroactive application for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). To date this Court has only cited *Gideon v. Wainwright*, 372 U.S. 335 (1963) as the "sort of rule" falling within this exception. *O'Dell*, 117 S.Ct. at 1978. The Ninth Circuit's requirement of implied bias based on incomplete voir dire responses does not fall within the "small core of rules requiring 'observance of those procedures that . . . are implicit in the concept of ordered liberty.'" *Graham v. Collins*, 506 U.S. 461, 478 (1993),

quoting *Teague*, 489 U.S. at 311 (internal quote marks omitted).[8]

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8. The Ninth Circuit's description of its implied bias rule as "deeply embedded in the fabric of due process" is strikingly similar to this Court's characterization of the second *Teague* exception as "rules . . . 'implicit in the concept of ordered liberty.'" Indeed, it could be argued that the Circuit Court's conclusion was less an attempt to sidestep *Teague* than to shoehorn its rule into the second exception. Reliance on antiquated English common law decisions is no more persuasive in either context. If, however, the Ninth Circuit were correct about the pedigree and importance of the rule it touts, the existence of a heretofore unacknowledged but nonetheless essential component of due process is "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

CONCLUSION

For the reasons stated above certiorari should be granted.

Dated: September 15, 1998.

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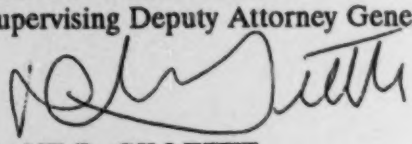

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